REGINA v. LIM HENG SOON & ORS.

[A. Cr. J. (Spenser Wilkinson, J.) February 24, 1954]

[Penang — Criminal Revision No. 1 of 1954]

Municipal Ordinance (Cap. 133), ss. 246 & 247(9) — Nuisance Notices — Nuisance Order — Enforcement of Building By-laws of the Rural Board — Proper machinery for such enforcement — Fine in futuro — Continuing offences.

The accused owned stalls at Bukit Mertajam, and were served with Nuisance Notices by the Rural Board under s. 246 of the Municipal Ordinance. These Notices not having been complied with the Magistrate made a Nuisance Order purporting to be under s. 247 of the Ordinance. The Order not having been complied with the defendants were summonsed under s. 247(9) of the Ordinance, charged with failing to comply with the Nuisance Order. They were each fined $5 a day during which they continue to disobey the Order. The defendants appeared to have been allowed to continue the use of their stalls in their existing condition upon payment of the sum of $5 a day.

Held: fines for continuing offences can only be imposed after proof that the offence has continued. As the defendants had not committed any breach of the law, all payments of fines must be refunded; (2) a Nuisance Order should not be made with the object of enforcement of Building By-laws for which there is a remedy under s. 144(10) of the Municipal Ordinance.

Case referred to:—

(1) *Airey v. Smith* (1907) 2 K.B. 273.

CRIMINAL REVISION.

J. D. Peterkin (Federal Counsel) for the Crown.

Lim Cheng Ean for the first nine accused.

Spenser Wilkinson, J. : — In this case Nuisance Notices purporting to be under section 246 of the Municipal Ordinance were served by the Rural Board upon the ten accused who owned certain stalls in Bukit Mertajam. These Notices not having been complied with in April 1950 the Magistrate made a Nuisance Order purporting to be under section 247 of the same Ordinance. For some reason which has not been explained the records of the Magistrate's Court are seriously defective and the record contains no copies of the Nuisance Notices nor the original of the Nuisance Order. The learned Deputy Public Prosecutor however was able to produce from the Rural Board file a copy of one of the Nuisance Notices and there is in the Court file what purports to be a copy of the Nuisance Order.

The Nuisance Order not having been complied with the defendants were summoned under section 247(9) of the Municipal Ordinance. Only three of the charges were before me and although it appears to me that these charges are gravely defective, in view of my decision on other points I do not need to go into this.

After certain adjournments these Summonses came on for hearing on the 20th February, 1951 when after hearing certain evidence the Magistrate found all the defendants guilty. I would remark in passing that, although one of the allegations in the charge was that the premises in question were dwelling houses, there was in my opinion no sufficient evidence before the Magistrate on the 20th February upon which he could properly have found these premises to have been used as dwelling houses.

The Magistrate having convicted the defendants made the following order :—

"Fined $5 a day during which the defendants continue to disobey order. Plus $1 cost of summons each. To take effect from today."

It seems quite plain to me that this was an order finding the defendants *in futuro* in respect of breaches of the law which they had not yet committed. Indeed it is not disputed that this was the manner in which the order was interpreted and fines were in fact collected over a long period from various of the defendants without further intervention by the Court. In effect the defendants appear to have been allowed to continue the use of their stalls in their existing condition upon payment of the sum of $5 a day.

The learned Deputy Public Prosecutor admitted that such an order could not be supported and I have no doubt that it cannot stand. Where the law provides for a continuing offence a fine can be imposed in respect of every day upon which it is proved that the offence has continued — but the only authority that can decide whether or not the offence has continued is the Court.

The following passage appears in *Stone's Justices Manual*, 79th edition, page 184 :—

"A penalty of a fixed sum and a further sum per day during the continuance of the offence may be adjudged where authorised by statute upon one information."

This sentence is to some extent ambiguous and might perhaps be thought to justify the imposition of a fine *in futuro;* but the authorities cited in support of the proposition make it clear that fines for a continuing offence can be imposed only after proof that the offence has continued (see *Airey v. Smith*[1]).

For these reasons I have no alternative but to quash the convictions, to set aside the order imposing the fines, and to order that all payments of fines made thereunder be refunded to the defendants.

The other question that arises on this revision is whether the Nuisance Order made by the Magistrate is correct. In my opinion the procedure in regard to these premises was misconceived from the start. What the Rural Board was really endeavouring to do was to

enforce the Building By-laws. Machinery for this is provided by section 144(10) of the Municipal Ordinance. Instead, however, of proceeding under this section they purported to proceed by way of the Nuisance Sections of the Ordinance, describing what was really a breach of the Building By-laws as a nuisance. The order itself shows that the two procedures have been confused. The first paragraph of the order reads as follows :—

"Whereas the said Lim Heng Soon owner of the said premises within the meaning of the Municipal Ordinance, Cap. 133 has this 25th day of April, 1950 appeared before me to answer the matter of a complaint made by N. C. Scully, Sanitary Inspector, Bukit Mertajam, on behalf of the Chairman, Rural Board, Province Wellesley, that a Rural Board Nuisance Notice under s. 246 of the Municipal Ordinance, Cap. 133 was served on Lim Heng Soon, the owner of premises unnumbered, Tokong Lane, Bukit Mertajam on 8.12.49 to reconstruct the said building so as to comply with the Rural Board. Province Wellesley Building By-laws."

The works called for by the order are as follows :—

"1. Width of the building should be 20 feet and depth 80 feet.
2. Walls should be of bricks to a height of 10 feet from floor to wall plate.
3. Roof should be of tiles.
4. Floor should be of concrete rendered smooth in cement.
5. Open space should equal to one half the built-on area exclusive of party and external walls.
6. Window space should equal 1/10th of the floor area in all living rooms and opening directly into the external air.
7. Living rooms should be at least 80 sq. feet in area.
8. Kitchen should be separate from the main building, having smooth cement floor, brick walls and tiled jack-roof.
9. Drainage for the entire building should be through 6 inch cement drain all round and having its outlet leading into the public road drain.
10. Latrine should be of Rural Board Approved Type and provided with a 6 inch cement drain from the bucket chamber to the drain of the main building.
11. A piped water supply should be provided.
12. Land owner's permission in writing should be obtained prior to carrying out of the above-mentioned works."

I find it very difficult to see that any of the works thus called for are in fact designed to abate a nuisance. In the evidence given before the learned Magistrate on the 20th February, 1951 the following passage appears in the evidence of the 2nd Prosecution Witness :—

"The nuisance is that these buildings are not provided with proper kitchens, etc. The nuisance is that these are dwelling houses."

In my opinion neither of these facts can by themselves be said to constitute a nuisance. Under the provisions of section 246 of the Municipal Ordinance the works which the Authority may call for are to execute such works and do such things as are necessary for the purpose of abating the nuisance, and the Authority has no power to call for any works which are not necessary for that specific purpose. In the same way, an order under section 247(3) can only call upon the defendant to do what is necessary to abate the nuisance. It follows that the so-called Abatement of Nuisance Orders in this case were Orders which, in the circumstances of the case, the learned Magistrate had no power to make and they must therefore be set aside.

Order accordingly.

Re SIN POH AMALGAMATED LTD. & ORS.

[O. C. J. (Murray-Aynsley C.J.) June 9, 1954]

[Singapore — Originating Motion Nos. 21, 22, 23, 24, 25 & 26 of 1954]

Contempt of Court — Publication by certain newspapers in reference to proceedings pending hearing — Whether such publications constitute contempt — Gravity — Trial by jury.

An application on behalf of the Attorney-General for leave to issue Writs of Attachment for contempt was made against six newspapers and their respective editors. It was alleged that the newspapers concerned had published certain matters with regard to pending proceedings which tended to prejudice the trial of the 48 persons charged.

Held: (1) any comment of a tendencious character which judges in advance the issues to be decided in proceedings which are pending, may be contempt of Court; (2) the gravity of the offence is less where the pending trial is before a judge or magistrate than where the pending trial is a trial by jury but nevertheless the matter should not be regarded lightly.

APPLICATION to issue Writs of Attachment.

E. P. Shanks (Senior Crown Counsel) for the Attorney-General.

Dr. C. H. Withers-Payne for 1st, 2nd and 4th respondents.

M. B. Brash for 3rd respondents.

A. P. Rajah for 5th respondents.

Philip Hoalim for the 6th respondents.

Cur. Adv. Vult.

Murray-Aynsley, C.J. : — On May 13th certain individuals collided with the Police. As a result of this 48 persons have been charged under section 186 of the Penal Code and these cases will in due course be dealt with in one of the Police Courts. It is alleged that certain newspapers have, by reason of certain matters published by them, been guilty of contempt of Court in reference to those proceedings.

Before I consider these cases in detail I think it desirable to make some observations of a general character. Contempt of Court can be committed with